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No. 104

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CHARLES ELMORE
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,
Appellant.

vs.

JOSEPH B. THOMPSON, Superintendent of the Insurance Department of the State of Missouri and STRATTON SHARTEL, Attorney General of the State of Missouri,
Appellee.

Appeal from the District Court of the United States for the Western District of Missouri.

REPLY BRIEF FOR APPELLANT.

ROBERT J. FOLONIE,
JOHN S. LEAHY,
WILLIAM S. HOGSETT,
ASHLEY COCKRILL,
COUNSEL FOR APPELLANT.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

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REPLY BRIEF FOR APPELLANT.

Reply to appellees' statement of facts.

Appellees, in their brief, have virtually conceded the case of the appellant. In effect they abandon the grounds asserted by the court below in its opinion as the basis for the decision. Appellees assert new and different supposed grounds for sustaining the Court's order. The trial Court did not deny an interlocutory injunction, upon the theory that the appellant had failed to make a case because it presented it upon the earned and incurred basis; but, to the contrary, granted interlocutory injunctions, upon identical bills, to other complaining insurance companies (Rec. 127, 128). The court below, while criticising such basis, did not predicate its denial of relief thereon, but grounded such action on its part solely upon the basis that appellant was a party to the stipulation, which the

Court held barred relief (Rec. 59). We have pointed this out specifically in the brief for appellant. (Appellant's Brief 7.)

Appellees, recognizing that the stipulation furnishes no bar to an interlocutory injunction, assert other grounds why the injunctions might properly have been denied, and says:

> "A three-judge court was assembled and it denied a temporary injunction to appellant and 113 other companies on three grounds, although the opinion might be said to have finally rested on the one ground." (Brief for Appellees 2.)

We do not exactly understand how an order denying an injunction could be made "on three grounds" and, at the same time, be said "to have finally rested on one ground." The three grounds which appellees assert (but which were not the predicate of the opinion below other than the point as to stipulation) are:

(*a*) Failure to make "restitution."

(*b*) *Res adjudicata.*

(*c*) Failure to show confiscation, because experience is stated upon earned and incurred basis and not upon the basis contended for by appellees. (Brief of Appellees 2.)

The court below did not base its action upon *res adjudicata* and that issue was not properly involved in the court below, nor is it a ground for barring relief either mentioned in the opinion or arising on the record, as we shall point out in later argument.

The argument by appellees that confiscation was not proven because income and outgo were not completely disclosed is only another way of asserting that the earned and incurred basis for which appellant contends (Appellant's Brief, Point II, pp. 16, 29) is unsound.

Appellees have not, in their brief, followed the order of points as made by appellant, and in this reply we are therefore compelled to chose between the order on which points

are presented in the brief of the appellant and the order in which they are presented in the brief of the appellees. We shall, for convenience, adopt the former.

I.

Confiscation.

(Appellant's Brief 24.)

The first point made by appellant (Appellant's Brief 24) discloses the income and outgo of the appellant over a period of years; discloses, also, that other insurance companies doing business in Missouri had a like result, and that the plaintiff, and such other companies in the aggregate, having done business for eleven years past with no profit whatever. By application of the rate order, their losses would be increased still further.

The appellees do not answer or purport to answer this point or the cases cited under it, (except as the impropriety of the earned and incurred basis of calculation is the subject of attack). The earned premium argument appears in appellant's brief, Point II (Appellant's Brief 29). The argument of appellees on the earned premium basis (Appellee's Point III) being applicable to a different point raised by appellant, will not be further noted under this point. It is therefore an uncontroverted fact herein that appellant had outgo in excess of its income for eleven years prior to the commencement of its suit. The prescribed rate permitted no return, above outgo, to the operator of the business; and cases were cited by appellant to the effect that this is confiscatory—appellee does not controvert our contention. (Appellant's Brief 25, 26.)

I-a.

Other uncontroverted points.

Other points made in appellant's brief, which are in no way argued or controverted in the appellees' brief and, therefore, are undisputed upon the record, are the following:

(*a*) The statute, under which the rate order was made, made no provision for notice or hearing. (Appellant's Brief 27.)

(*b*) The order is an unwarrantable invasion of the right of appellant to manage its own business. (Appellant's Brief 27.)

(*c*) The statute is void, in that it is made to apply to stock fire insurance companies, expressly exempting other insurers similarly situated and doing a like business. (Appellant's Brief 68.)

(*d*) The court below found that the method employed by the superintendent was unjustifiable in the basis employed by him, in that he arbitrarily rejected outgo from consideration, which was properly to be taken into account. Such arbitrary basis makes the rate order a nullity. (Appellant's Brief 28.)

(*e*) The superintendent erroneously included interest on investments as an item of income and his action in doing so was held by the court below to be arbitrary; wherefore an interlocutory injunction should have been granted, because his rate order was a nullity because of such arbitrary action. (Appellant's Brief 28.)

(*f*) The superintendent's order was made upon the consideration of aggregate experience only of all companies in the state, rejecting from all consideration the individual experience of the plaintiff and its confiscatory effect upon the plaintiff. This was arbitrary and confiscatory action invalidating the rate order and was not the subject of consideration in the aggregate rate hearing. (Appellant's Brief 28, 29.)

II.

Propriety of earned and incurred basis.
(Appellant's Brief 29.)

The appellees discuss this subject under Point II of appellees' brief (Appellees' Brief 6, 52). We have already presented this point under our original brief, Point II (Appellant's Brief 29) and shall not elaborate it here. We believe the matter should more properly have been reserved for the final hearing of the case when the evidence would be before the Court, as it is a mixed subject of law and fact. But if the matter were one to be determined as a strictly legal proposition, independent of evidence, it could not, upon a fair consideration, be decided against the appellant.

The caption of the appellees' Point III is misleading, wherein it is said that "the District Court held that all of the petitions for temporary injunction should be dismissed * * *," etc., because of employment of the earned and incurred basis. We have already pointed out in our original brief (p. 30) that the Court did not decide the case on that point and, to the contrary, in those cases where a stipulation was not involved, granted interlocutory injunctions, although the experience was therein set forth on the earned basis.

III.

The superintendent violated the stipulation whereby appellant was relieved from obligations which could give rise to an estoppel.

(Appellant's Brief 37.)

The appellees have not argued or presented anything in answer to this point which we regard as conclusive of the error of the court below. It therefore stands conceded that

the superintendent refused to abide by the stipulation. He was to make a rate order based upon findings of fact, as respects the earned and incurred basis. He made no such findings and did not base his order on such findings, as it was stipulated he would do. (Appellant's Brief 38.)

It not only stands conceded but by the uncontradicted proof in the case it was shown that the superintendent abandoned and declined to abide by the stipulation (Appellant's Brief 39). This conceded point is of itself sufficient to cause a reversal of the order of the court below.

IV.

Appellant is not precluded from relief because of waiver or estoppel.

(Appellant's Brief 40.)

Under this point the appellant cited cases and presented argument to the effect that none of the actions attributable to it were pursuant to the stipulation but were pursuant to independent right and, therefore, could not be creative of an estoppel. The appellees have made no answer to this argument and therefore are in the position of conceding the correctness of our position upon the record.

V.

Appellant did not by the stipulation agree to repay money to policyholders and therefore the doctrine of clean hands is not soundly applied to bar relief.

(Appellant's Brief 44.)

Appellees seek to meet this argument under Point II of appellees' brief (Appellees' Brief 5, 25). The appellees repeatedly state in this point that appellant "had stipulated to make restitution" (Appellees' Brief 28), but there is nothing in the record to bear out the assertion, for there was no

stipulation so providing. What appellant stipulated to do was to furnish bonds, and they were furnished. Appellees, apparently, do not regard their own argument (that appellant had *stipulated* to make restitution) as having much force. They seem, rather, to base their argument on the proposition that "*regardless of* the stipulation it was the duty of appellant to refund all excess premiums collected under an order of the court, which was later set aside." (Appellees' Brief 28.)

There *was no order* of a court under power of which excess premiums were collected, nor was there any such order which was "later set aside." The record is devoid of anything to disclose such supposed facts.

Appellees state, "It was admitted by these insurance companies that they wrongfully retained this money due the policyholders" (Appellees' Brief 29). The appellant has never made such an admission, and there is none in the record.

Appellees cite many cases like that at the top of page 30 of appellees' brief, where a wrongdoer "*confesses* to have obtained from the Government by means of a fraudulent scheme," etc. The present situation bears no similarity to such cases. Even a superficial examination of appellees' cases will disclose that none of them is like the case at bar. Whether appellant is or is not entitled to retain the increase is the subject of litigation in this suit. It is not a case where it is *conceded* that the increase belongs to the other party to the litigation.

"Restitution"

In Point II of appellees' brief (Appellees' Brief 25), the appellees treat of the subject of coming into equity with clean hands and "*restitution.*"

The position of appellees is set out at page 26 of their brief, as follows:

> "The District Court held that it could not grant a temporary injunction because of the failure of *all* of these

> insurance companies to comply with their stipulation and make restitution. It is unconscionable and unthinkable that these same companies can *again litigate* this *same question* and keep all of these excess premiums which they *wrongfully* collected under an order of the court which has since been set aside. The rule is universal throughout America that where one receives something from another *under an order of the court* and later that order is set aside, restitution must be made of all that was received *under such order.*" (Italics are ours.)

The cases cited by appellees are all supposed to bear upon the propositions so asserted. The principal defects in the position of appellees exist in the following:

The District Court did not find "failure of all these insurance companies," for it granted injunctions to forty of the insurance companies bringing suit.

There is no basis for holding, and the court below did not place its decision, upon the ground of *res adjudicata,* nor hold that appellant was debarred from "again" litigating, nor did it hold that this case presents "this same question."

It does not appear that the sums collected by appellant were "wrongfully collected." To the contrary the Court granted injunctions to some insurance companies collecting amounts under identical circumstances and the question whether the collection is *wrongful* is the very point for ultimate determination upon the final hearing of the case.

The collections made by appellant were not "collected under an order of the court" but were collected by the inherent right of appellant to collect pre-existing rates, no lawful order of an authorized authority having superseded its power and the courts of Missouri having specifically held that the power to collect the former rates existed despite the rate order, as we have noted on page 42 and 43 of appellant's original brief. There having been no order of court under which collection was made, there necessarily has been no such order of court "which has since been set aside." Orders

of the court in the former proceeding in the state courts, as respects collection of excess premiums, are not set forth in the bill (which is the only pleading now in the case), nor in any of the evidence produced on the hearing of the interlocutory injunction. Both court and counsel are, under proper observance of the rules of law, bound to get their facts from pleadings or evidence. As they contain nothing to support the assertion made by appellees, there is nothing upon which the court below had power to act in defeat of the application for interlocutory injunction.

We have no quarrel whatever with the principle of the cases of the tenor of that appearing on page 29 of appellees' brief that "where plaintiff *admits* a sum of money to be due or equitably owing to defendant, his petition must show that he has paid or offered to pay, or must contain an averment of his willingness to pay such sum of money, to entitle him to relief by injunction."

The appellant does not, and never has admitted that any sum of money is due to the defendants or to policy holders, or that legally or equitably it owes anything to any one, but to the contrary, insists that it would be inequitable and confiscatory if it were required to return any monies. It asks the aid of the Court to prevent such injustice. The cases cited therefore, are not even remotely in support of the action of the court below in denying interlocutory injunction to appellant.

We can see no analogy in the present situation whatever with cases such as those appearing on page 44 of appellees' brief, that where a plaintiff, for example, secures a judgment and collects the amount of it from the defendant by execution and the case is thereafter reversed on appeal, that the Appellate Court should make an order that the plaintiff restore what he has collected. Such rule is elementary, but has no bearing on the present situation.

It appears to us that the case of *Cummings* v. *Mugge*, 94 Ill. 186, cited by appellees at page 43 of their brief, which

appellees state to be "a splendid opinion" is authority for the appellant and not for the appellees.

In that case, as appears from the quotation set out by appellees herein, the appellant in that case, who was defendant to an injunction proceeding, was restrained by injunction from meddling with the property which was in fact his own. The appellee, (the moving party in the injunction proceeding), wrongfully took possession of the property and disposed of the same, to his own use. The appellant asserted that he was entitled to have restitution of the value of the lumber, of which he was deprived, and his expenses included in the assessment of damages. The Court as quoted by appellee says:

> "*This position cannot be sustained.* The service of the writ of injunction in no way authorized or caused the wrongful act of appellee in taking and converting the property."

The present situation is analogous. The position of our opponents cannot be sustained because the review proceedings "in no way authorized or caused" the acts of the plaintiff in the case at bar, in exacting the premiums it did exact, but the acts of this appellant were independent of the Court proceedings. In fact, by the statute of Missouri as it existed at that time, the Court was not authorized to make any order authorizing or empowering the appellant to collect the former rates, but the statute specifically forbade that Court from making such order. The provisions of such statute will be found at the top of page 57 of appellant's original brief.

The appellees, under their brief, are committed to the theory that restitution is owing from the appellant to some one because (*a*) it received "something from another under an order of court"; (*b*) that such court order was later set aside; (*c*) that the court below proceeded on a similar assumption. (Appellees' Brief 26.) The theory is unfounded because:

(*a*) If there was any order of the state court in the review proceeding, authorizing collection of any amounts by appellant, such order is not in this record.

(*b*) If there was any order in the state court, its terms and conditions are not in the pleadings or proof in this record.

(*c*) If such an order were offered or presented, the appellant would be entitled to make objection to it and have its objections ruled upon, and it might well be that such objections ought to be sustained against such an offer because of want of power of the state court under the statute to make any order on the subject.

(*d*) If no order was made in the state court, or one was made which was without authority or jurisdictional power in the court to make it, then the appellant would be in the position of having *rightfully* collected premiums which it was either entitled to retain, because the rate order, was a nullity, *or* the appellant *wrongfully* exacted such sums in contravention of a lawful binding rate order.

The question whether the exaction was a lawful or unlawful exaction, is the ultimate issue in this case and the court below should not have decided that ultimate question upon mere conjecture or speculation that there was an order and what the terms of it were.

Appellant having shown at least *prima facie* that the rate order was a nullity, (and therefore that the old rates were in force and its exactions from the insuring public were lawful) should be protected in the possession of this fund upon exaction of proper security, and the issue as to its right to retain or duty to refund the money determined after a hearing of the case.

Appellant has presented argument and cases to the effect that the stipulation could not bind either the plaintiff or the defendant in litigation subsequent to review proceedings

and that it was not the intention on signing the stipulation that it should do so. (Appellant's Brief 48, 50.) Appellees have not sought to controvert the proposition so supported by authority and therefore stand confessing that the stipulation, on which alone the court below denied relief, is a nullity as applied to this case.

VI.

Stipulation lacking in mutuality.
(Appellant's Brief 55.)

The appellees have not even mentioned this point under any point of argument made by appellees.

VII.

If the stipulation be construed as a waiver in advance of infringement of constitutional guarantees thereafter accruing, it is a nullity. Appellant was under duress.
(Appellant's Brief 56.)

Appellant presented this under Point VII and the argument supported by cases covers eight pages. The appellees do not even mention this point in their brief.

VIII.

The attorneys representing stock companies en masse in an aggregate proceeding could not bind individual insurance companies so as to bar complaint of individual infringement of constitutional right thereafter accruing.
(Appellant's Brief 64.)

The appellees make no reply to this point, except very casually in connection with its argument of the point of *res adjudicata,* (which will be noted in a later subdivision of this reply).

IX.

Denial of equal protection.
(Appellant's Brief 68.)

This point is specifically made and cases cited to the effect that the statute is invalid because identical insurance is written by competitive companies exempted from the rate law and the rate order. Appellees in no way mention this point in their brief.

X.

Scope of police power.
(Appellant's Brief, 68.)

Under this point appellant presents arguments to show the grave doubt that the scope of *German Alliance Insurance Company* v. *Lewis*, 233 U. S. 339, should be extended so far as would be necessary to support the rate order in this case. We call attention now to the fact that in our original brief (Appellant's Brief 69), in the citation of the case of *Tyson & Bros.* v. *Banton*, that case is erroneously referred to as reported in 271 U. S. 418, whereas it is, in fact, reported 273 U. S. 418.

XI.

The matters involved are or such importance that they should have been reserved to final hearing and the rights of the parties protected by interlocutory injunction.
(Appellant's Brief 76.)

This point seriously urged upon the Court is not even mentioned by appellees in their brief.

XII.

The condition imposed for return of ten per cent of all premiums from November 15, 1922 to date is arbitrary, as the rate order was only effective from February 1, 1928.
(Appellant's Brief 80.)

This controlling point, which alone is sufficient to cause a reversal of the case, is ignored by appellees in their brief. We find mention of this matter in only on place in appellees' brief, and that is under appellees' Point I (Appellees' Brief, Point I, 10), that the question presented is a moot question. Such discussion appears in appellees' brief at page 20, at the bottom of the page. It is there stated that the matter "was not fully presented because not thought important in that litigation." (Appellees' Brief 21.) We are not clear just what point appellees make on this, except their statement that "the matter was not fully presented." We do not know how it could have been more fully presented, for it is set forth amply in the bill of complaint, where it is set forth in great detail that the superintendent of insurance did not, within thirty days, or at any other time prior to February 1, 1928, make a designation of classes (Rec. 44); that the failure to make designation of classes until five years after the rate order, during which time great changes occurred, was such a lapse of time that his power to designate classes was ended (Rec. 45); that no hearing or investigation of any kind was had or any notice given to the plaintiff of such class designation. It is further alleged that the plaintiff never made any designation of classes as prescribed by statute and that without such designation of classes by either plaintiff or the superintendent the rate order was not effective. (Rec. 45.)

The court below did not treat this matter as one "not thought important," nor one which "was not fully pre-

sented," but wrote a separate opinion upon this point which it filed as an addendum to the opinion. (Rec. 128.) In that opinion the Court expresses its debt to counsel for impressing upon the Court the importance of this matter. The Court says that "the suggestion of counsel is well made," namely, the suggestion that this effective date is a matter of controlling importance. Without fixing an effective date, no refund would be possible, for a date must be fixed as the court below says: "to enable the parties to know the amount of refund necessary" (Rec. 129). The statute specifically provided that such designation *must be made* and the insurance companies have thirty days in which to make it if they choose. If they fail to do so the superintendent may make it after the lapse of thirty days. He did make such designation until February 1, 1928 (and as of that date, Rec. 89). The court below said that no such designation was made by the appellant "and the superintendent did not make such until February 1, 1928, when he made the rate applicable to all classes." (Rec. 129.) The Court holds that the rate order is effective only from February 1, 1928 as to companies not parties to the stipulation (Rec. 130), but as to appellant it selects a different date, casting a greater burden upon the appellant. The matter is of controlling importance in the case and cannot be slighted or overlooked, as appellees seek to have the Court do.

New propositions urged by appellees.

Appellees urge two propositions affirmatively:

(A) That this is a moot case;

(B) That the matter is *res adjudicata.*

As employment of divisional numberings used in the preceding briefs would only be confusing, we have adopted arbitrary numbers A and B for discussion of these points.

(A) The proposition that this is a moot case.

(Appellees' Brief, Point I, 10.)

This point made by appellees is so baseless and so completely unsupported in the record that the approach to its discussion presents difficulty. Before entering upon discussion of its detail, we wish to correct statements made under this point by appellees.

Appellees state that the appellant "has litigated the confiscatory effect of such reduction. The Supreme Court of Missouri held against them, and the Supreme Court of the United States held against them." (Appellees' Brief 10.)

There is nothing in the record to support such statement. The Supreme Court of the United States did not hold against appellant upon the issue of confiscation; but, having granted certiorari in the belief that the issue of confiscation existed in the case, dismissed the writ upon the ground that by the nature of the case the issue of confiscation, which was an individual one, could not be involved in a proceeding *en masse* by a group of companies testing aggregate experience of such companies in the state.

Aetna Insurance Company v. *Hyde*, 275 U. S. 440.

Appellees state that "the only relief asked in the District Court was a temporary injunction to restrain the officials of the state from putting this ten per cent reduction order into effect." (Appellees' Brief 10.) The prayer of the bill in fact is, that the rate reduction order in question be adjudged confiscatory and unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States and in violation of the Constitution of Missouri, as a deprivation of property without due process of law and a denial of equal protection of the laws. (Rec. 34.) That the proposed action of the State authorities, by proceeding for penalties, fines, imprisonment and revocation of license, shall

be held in violation of the same constitutional guarantees. (Rec. 34.) That the defendants, the Insurance Superintendent and the Attorney General of Missouri and their deputies, agents, etc. be enjoined (*a*) from any action to enforce such rate order against the plaintiff and its agencies. (Rec. 34.)

This bill prays that an interlocutory injunction may issue to restrain prosecutions, actions for penalties, and to restrain interference with the plaintiff in collecting the former rates which but for the rate order would be collected. (Rec. 35-36.) That the defendants be enjoined from cancelling the license of the plaintiff or refusing to renew its license because of the fact it had collected such premiums. (Rec. 36.)

It will be noted that the bill seeks to enjoin prosecutions because of exaction of the premiums in the past, to restrain actions to recover the excess and to protect the plaintiff in collecting the former rates pending suit. The reasons why the point that the controversy is moot is a baseless contention may be stated briefly, as follows:

1. The supposed matters, stated to have created a moot condition, are not any part of the record herein and are not before the Court so as to warrant the Court in taking any action pursuant to such supposed representations. The matters of supposed facts (set forth on pp. 11-14 of Appellees' Brief) are not appropriate for consideration by this Court. We do not challenge the fact that there are cases in the books which were held under their facts to be moot cases. A perfect example of such a case is that cited by appellees at page 19 of their brief:

> "Thus, if the term of imprisonment expires pending an appeal by the jailor from a decision in a habeas corpus proceeding, releasing a prisoner from custody, the appeal will be dismissed."

This case has none of the attributes of a moot controversy such as are recited in the cases set forth by appellees.

2. Appellees still assert that "the reduction order was effective November 14, 1922." (Appellees' Brief 22.)

The supposed action of the appellant relied upon as disposing of the entire controversy between appellant and appellees is stated by appellees to have been a filing under protest and under duress (Appellees' Brief 11), and is a filing making a reduction as of February 1, 1928. (Appellees' Brief 12.) Appellant has collected an excess above the amount provided in the rate order since November 15, 1922. Under appellees' unsupported statement, in their brief appellant proposes to make a refund only since 1928. The excess collected from November 15, 1922, to February 1, 1928, is at issue. So is the future, even under appellees' statement.

Appellant asserts that the effective date of the rate order is February 1, 1928. But the appellees assert and claim that the acts of the appellant in collecting the former rate of premium from November 15, 1922, to February 1, 1928, was illegal and threaten to cancel the license of the appellant and subject it to prosecutions for collecting and retaining the old premium rate during such *interim*. Appellant is entitled to an interlocutory injunction to restrain cancellation of its license because of supposed failure to return premiums it is not bound to return.

The rate order was effective as to appellant either on February 1, 1928, or on November 15, 1922.

If it was effective on February 1, 1928, then appellant is entitled to an interlocutory and a permanent injunction, restraining the appellees from lawlessly cancelling its license because of exaction of lawful premiums (at preexisting rates) from November 15, 1922, to February 1, 1928. If such is the situation, then this is not a moot case.

If the effective date was November 1, 1922, then the question is presented whether appellant is or is not bound to make refund of premiums from such date to February 1, 1928, in the light of its objections to the rate order as confiscatory and violative of constitutional right. If that is the situation, appellant is likewise entitled to relief, and the case

is not moot. In no aspect of this case can it be said that there is not a genuine, contested suit.

3. If appellees' statements of supposed fact were all accepted as true appellant would be entitled to an injunction, as it appears that the acts of appellant said to make the action moot were made under duress of an unlawful rate order. Appellant, under appellees' statement, refrains from collecting the excess only during such period as it is without the protection of an injunction and to preserve its license and established business. It should have an interlocutory injunction, restraining interference for the future, so it may reinstate its old rate charges under the protection of the Court, with appropriate bonds or other indemnity to the insuring public.

4. In the case of *Banton* v. *Belt Line Railway Co.*, 268 U. S. 413, (erroneously cited by us heretofore as 236 U. S.), suit was commenced to enjoin enforcement of an order of a public service commission of New York. The issue was that of confiscation, and the decree found the order to be confiscatory. It is not the law that an insurance company, or any other interest subject to public regulation, forfeits its right to complain of confiscation from day to day, because under duress of an illegal order it conforms thereto in the *interim* before it is able to secure relief. As was said in the *Banton case*:

> "The continued enforcement of that rate would operate to take appellee's property without just compensation and compel it to suffer daily confiscation. Notwithstanding the matter was pending on rehearing, the appellee had the right to sue in the Federal court to enjoin the enforcement of the rate."

It was asserted in the *Banton case* that:

> "Appellants insist that the appellee voluntarily assumed the obligation to transfer passengers pursuant to the order of October 29, 1912, for two cents each, and having been incorporated and having acquired its property subsequent and subject to such order, it is not entitled to complain of the order as an infringement of any constitutional right."

This Court rejected the contention that because conformity had been made to the order in the past, that this prevented complaint of it, if it was, in fact, confiscatory.

The Court points out that the utility had no recourse except compliance, which was prescribed under penalties, as is the case here, and the Court says:

> "A rate that is just and reasonable when prescribed, subsequently may become too low, unreasonable and confiscatory." (Citing cases.)

The fact that compliance with an order was made under duress and under protest, as appellees say is the case here, does not preclude attack if confiscation in fact exists.

The Court in the *Banton case* said (p. 418):

> "That company did not agree to serve for the prescribed joint fare of five cents, and was not bound to do so if the rate was found to be, or if thereafter it should become, confiscatory. It did not surrender the protection of the Fourteenth Amendment."

The language quoted clearly means that the protection of the Fourteenth Amendment is not surrendered, by compliance with a reduced rate imposed by a commission, if the rate is in fact confiscatory, or thereafter becomes so. It being an inconfrovertible fact herein, that the rate prescribed is confiscatory, appellant is entitled to relief therefrom, and entitled an injunction restraining interference with its collection, even if the lesser rate has been collected under duress of the illegal order.

In *Groesbeck* v. *Duluth, South Shore & Atlantic Railway Co.*, 250 U. S. 607, the appeal was from a decree enjoining interference with a rate violative of the directions of a statute fixing minimum passenger railway rates. The Court in the case cited held that even though the statute were repealed under which the two cent rate was imposed, there remained the question of refund of moneys collected and held

over specified period of time and for this reason the case was not a moot case. (P. 609.) So, in the present case, there is nothing, even in the statement of appellees in its brief, disclosing that appellant has undertaken to, has promised, intends or will return the excess collected by it between November 15, 1922 and February 1, 1928, unless required so to do by some judgment or proceeding determining that it is not entitled to retain such moneys. Neither will the appellant refrain from collecting such excess in the future if it can secure protection from destruction of its business.

(B) Res adjudicata.

The appellees assert that the issues herein are adjudicated by former decision. The issue, *res adjudicata*, does not arise upon this record.

1. Former adjudication is neither proven nor pleaded by the defendant and the issue was therefore not before the court below, nor is it involved here. If such defense is not pleaded by answer it is not available.

U. S. v. *Bliss*, 172 U. S. 321.

Harrison v. *Remington Paper Co.*, 72 C. C. A. 405, 140 Fed. Rep. 385, 5 A. & E. Am. Cas. 314, 3 L. R. A. (N. S.) 954. (C. C. A. 8th Cir., per Sanborn, J.)

Williams v. *Williams*, 265 Ill. 64.

Glenn v. *Priest*, 48 Fed. Rep. 19. (Cir. Court E. Dist. Mo.)

The determination that there is or is not an identity of issues in the case brought before the court with some former proceeding, for the judgment to conform to due process must afford an opportunity to the party so to be debarred (under proper issues formed) to present proof disclosing the pleadings, evidence, and in some cases the arguments, to establish as a fact whether or not there was an identity of parties and

of issues making a former proceeding an adjudication. There is no allegation in the bill from which such conclusion can even inferentially be drawn, and the bill is the only pleading in the case. The pleadings in the former proceeding are not before the court; nor is the evidence nor any of the arguments in the former proceeding before the court; nor may the Court take judicial notice of the facts of the former proceeding as they may be set out in some printed opinion. The Court may take judicial notice of the opinions of the Court as declarations of the law, but not take judicial notice of any supposed recital of facts in them as precluding the litigant in a later proceeding. The court below did not decide against the appellant on the motion for an interlocutory injunction, on the ground of *res adjudicata*, nor could it do so because the issue was not before the Court for consideration.

Appellees concede that the opinion below does not proceed upon this ground (Appellees' Brief 63), but seeks to carry the thought that it was inferentially decided in the court below. Such is not the case, as the opinion in the court below will disclose. If the matter should proceed to proof, we anticipate that the proof would show that there was neither an identity of parties nor an identity of issues in the former proceeding in question. The appellees say, respecting the former proceeding, that:

> "The sole question in that case was whether or not the ten per cent reduction order of October 9, 1922 was confiscatory. The Supreme Court of Missouri held it was not and these companies cannot again litigate that question as to that past experience." (Appellees' Brief 65.)

There is not a scintilla of proof in the record to support such assertion nor any answer or equivalent pleading to support such evidence had it been offered.

Not only was the question of confiscation not the sole question in such former proceeding, but it was not involved in

that case at all. This Court granted certiorari to the Supreme Court of Missouri to review the aggregate proceeding brought *en masse* by companies in Missouri, to review a rate order also made *en masse*. No consideration of the individual experience or situation of this plaintiff was in issue. This Court dismissed the writ after hearing on the ground that by the nature of the proceeding the issue of confiscation could not arise and could not be involved. This Court held that confiscation is an issue which can be raised only by a single entity which is affected and that in an *en masse* proceeding the issue of confiscation does not and cannot arise. The sole question for consideration was aggregate experience and the effect upon the business of companies in the aggregate and not its effect upon the individual companies involved. It was upon these explicit grounds that this Court refused to consider the case.

Aetna Insurance Company v. *Hyde*, 275 U. S. 440.

We present the following argument out of an excess of precaution, insisting, however, that the issue of former adjudication is not presented upon the record so as to warrant this Court in weighing it at all.

The statute under which the review proceedings were had, and under which the rate order was made, provided for a consideration of aggregate experience of all insurance companies in the State only, and for a rate order applicable to them *en masse* on such aggregate consideration.

Rev. St. of Mo. 1919, Sec. 6283 (Appellees' Brief 2).
Rev. St. of Mo. 1919, Sec. 6284 (Appellant's Brief 57.)

One of the chief grounds of complaint made in the present bill is that the order is confiscatory *as to appellant*, which has done business in Missouri at a loss over a period of many years (Rec. 11), and it is alleged that "the individual experi-

ence of plaintiff was in no wise considered nor contemplated by said defendant Hyde" in his hearings and rate order. (Rec. 24.) Such former joint proceeding presents neither an identity of issues nor of parties with the present individual suit. No other conclusion is deducible from the opinion in *Aetna Ins. Co.* v. *Hyde,* 275 U. S. 440. The fact that the present suit grows out of the same subject matter is of no importance, for it is not the same case if it "involves a different question or claim in regard to it." 34 C. J. 915.

In *Clifton* v. *Meuser,* 88 Kans. 408, 129 Pac. 159, 43 L. R. A. (N. S.) 124, the Supreme Court of Kansas had before it a case, the facts wherein were as follows:

Sarah Potts sued Amanda Clifton for a sum of money. Amanda Clifton made the defense to such suit, that the money had been given her in consideration of an express promise to nurse and care for Mrs. Potts. The personal representative of Mrs. Potts recovered judgment in such case upon such issues. Thereafter, Mrs. Clifton filed a claim against the estate of Mrs. Potts for the reasonable value of her services in nursing and caring for Mrs. Potts, and the question was presented whether *res judicata* barred the case. The Court say that "the right of Mrs. Clifton to recover from the estate the reasonable value of her services to Mrs. Potts cannot be regarded as having been adjudicated in the first action." The Court further says:

> "A judgment which may have resulted from a determination of either one of two or more separate issues, does not constitute an adjudication as to either, where it is not shown upon which it *was, in fact, based.*"

It is further stated in the opinion, that:

> "*The issues in the two actions were not identical.* In the first, the question was whether an *express* agreement for the passing of the title to the money had been made and performed. In the second, the question was whether services had been rendered under such circumstances that the law *implied* a contract to pay their reasonable value."

It is further said that:

> "The same petition may include in separate counts a claim based upon an express contract to pay an agreed sum for services, and one based upon an implied contract to pay their reasonable value. *Barry* v. *Craig*, 76 Kans. 345. Each count states a complete cause of action. Proof in support of one is not admissible under the allegations of another. 9 Cyc. 349. The causes of action are not the same. They are distinct and different, although not wholly independent, being connected by this tie; there may not be a separate recovery upon each. It follows that a plaintiff who sues upon an express contract without adding a count upon a *quantum meruit*, waives nothing, and if defeated, is not thereby barred from maintaining a subsequent action upon an agreement arising by implication of law."

In *Bilsland, Executor,* v. *McManomy,* 82 Ind. 139, the action was one for injunction to enjoin the seizure and sale of property upon execution, in favor of Bilsland, Executor of Rawles. The ground of injunction was an asserted release of appellee from the judgment on which the execution issued. One of the defenses to the injunction suit was that of former adjudication. Rawles, in his lifetime, had recovered a judgment against appellee McManomy and one Robert Brown. After the death of Rawles, his Executor, Bilsland, had caused an execution to issue on said judgment and a bill for injunction had been filed wherein "McManomy and Brown together brought a suit against the same parties who were sued in this case, setting out as ground therefor the above writing made by David Rawles." (p. 142.) McManomy and Brown failed in their injunction suit and it is asserted that once having brought an injunction suit to enjoin the identical judgment, and the matter having gone to a decree, the same is *res judicata.* The Court says at page 144:

> "In respect to their last proposition, counsel insist that the appellee might have made his alleged parol agreement a cause for the injunction in the first action and that not having done so, he is precluded by the judgment in that action from seeking the same relief as in that cause in this action."

The Court, in holding that no adjudication exists by reason of such prior joint proceeding, says:

> "In the *joint* action of the appellee and Brown to enjoin the collection of the judgment, they could avail themselves only of joint causes of action or such causes as inured to the benefit of both, and neither of them could have pleaded or proved a separate release which was not available to the other."

The case above cited is indistinguishable in principle from the case at bar. In that case, a suit was brought by two judgment debtors, to enjoin an execution running against the two, upon the assertion that subsequent to judgment there had been a release of the two. They failed in that suit. Still later, one of the judgment debtors brought suit, asserting there had been a release of him, wherefore the judgment should be enjoined as to him, although to be left in force as to the other, a judgment debtor. It was held that the suit was not debarred by the former proceedings.

In the case at bar, it is asserted that there was a suit by all the insurance companies in the State of Missouri to nullify, in its entirety, a rate order affecting all companies in the State. This attack was unsuccessful. The present plaintiff brings a suit to nullify the rate order as to it individually, regardless of its enforcement against the other parties to the rate order. This upon ground that the same may not lawfully be enforced or made operative against it, the plaintiff, because to do so would, as to it, the plaintiff, be confiscatory. The principle underlying the situation is identical with that before the Supreme Court of Indiana in the case cited.

The theory of the Missouri rating statute is stated under somewhat similar circumstances in an insurance rate case in Kansas, in the case of

Aetna Ins. Co. v. *Travis,* 124 Kans. 350,

where it is said:

> "For the purpose of determining rates of premiums, plaintiffs must be considered as a whole, just as though collectively they constituted one company."

A review made by companies jointly, testing such a proceeding wherein they proceed as if they were one company, necessarily does warrant determination of the issue of confiscation, and such is the effect of the decision of this Court in *Aetna Ins. Co.* v. *Hyde,* 275 U. S. 440.

The question in the former proceeding was the validity of the rate order *per se* and not its *effect* upon application to the individual companies. As this Court said, in a case involving two cent passenger fare cases, in *Missouri Rate Cases,* 230 U. S. 474, 508, 509, wherein individual suits were brought by seventeen railroads and consolidated for hearing, and in which they were held valid as to twelve roads and confiscatory as to five:

> "The acts are valid upon their face as a proper exercise of governmental authority in the establishment of reasonable rates, and *each* complainant in order to succeed in assailing them must show that *as to it* the rates are confiscatory."

In the same way this Court has held rates compensatory as to one and confiscatory as to another, in the case of *Northern Pacific Railroad Co.* v. *North Dakota,* 236 U. S. 585.

In the review proceeding relied upon by appellees, evidence would not have been received as to the sound and prudent management of the National Fire Insurance Company or the experience of its officers, nor whether this appellant made or lost money in Missouri. The issue there was as to the aggregate experience of all companies doing business in the state even if some of them were poorly managed, or even grossly misconducted. The fact that the appellant, although well managed, prudently conducted, had lost money and would do so under the rate order, was a matter of no materiality to that case. The individual experience of this plaintiff is of controlling importance in this suit but was immaterial in the former proceedings.

In the case of *Water, Light & Gas Co.* v. *Hutchinson*, 160 Fed. 41, 19 L. R. A. (N. S.) 219, the Circuit Court of Appeals for the Eighth Circuit held that a judgment for the defendant in a suit upon an *express* contract for furnishing electric light to a city is no bar to a subsequent suit for the same service upon a *quantum meruit*. It is held that this constituted a different cause of action. When identity of actions is for consideration "the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined."

In discussing the subject of estoppel by former adjudication, the Court says:

> "It is the identity and the legal quality of the subject of the two actions, as well as the identity of parties, which create the estoppel. It may not depend so much upon the identity of the thing sued for, 'but rather from the one of identity in the *issues* involved in the two actions.'"

Quoting from Freeman on Judgments, Volume I, Section 259, the Court says:

> "If different proofs are required to sustain two actions a judgment in one of them is no bar to the other. If the evidence in a second suit between the same parties is sufficient to entitle plaintiff to recover, his right cannot be defeated by showing any judgment against him in any action where the evidence in the present suit could not, if offered, have altered the result."

It is further said in that case:

> "If there be any uncertainty as to whether the recovery had by the plaintiff in the former suit embraced the items of the account sued upon in the present action, resort may be had both to the record and extrinsic evidence showing the precise point involved and determined."

Even if the claim of confiscation had been asserted in the former proceeding, this would be a matter of no moment because it was not proper for consideration in that case.

As this Court said in *Ash Sheep Company* v. *United States*, 252 U. S. 159:

> "Rejection of a claim because pursued in an action in which it cannot be entertained, does not constitute an estoppel against the pursuit of the same right in an appropriate proceeding. We agree with the court of appeals that a judgment is not conclusive of any question, which from the nature of the case, or the form of the action, could not have been adjudicated in the case in which it was rendered." (p. 170.)

Applying the language of the Court to the case here for consideration, we respectfully submit that it settles the issue of law now presented upon the bill of complaint in this case.

The Court further say:

> "A judgment is not conclusive of any question, which from the *nature of the case or the form of the action* could not be adjudicated in the case in which it was rendered."

The constitutionality of the rating statute of Missouri was not open to attack in the review proceeding, because in a proceeding under the statute its constitutionality cannot be assailed.

State, ex rel. Waterworth v. *Harty*, 278 Mo. 694.

The attempt in the review proceeding to overturn the rate order was an unsuccessful attack. One may not *in the same proceeding* both assail a statute and rely upon it. But the fact that one has unsuccessfullly undertaken to secure relief under the statute in a joint action is not a bar to an individual assault upon the statute and rate order in an independent proceeding. The appellant does not rely upon any provisions of the Missouri statute in its present attack upon the statute and rate order. The views expressed by this Court in

Buck v. *Kuykendall*, 267 U. S. 307,

are pertinent, where this Court said (p. 316):

> "But in the case at bar, Buck does not rely upon any provision of the statute assailed; and he has received no

benefit under it. He was willing, if permitted to use the highways, to comply with all the laws relating to common carriers. But the permission sought was denied. The case presents no element of estoppel."

The conglomerate attack on the rate order in its entirety in the former suit does not preclude an attack now upon the ground that although it may be valid as to others, it is invalid as to the plaintiff, because it is confiscatory as to the plaintiff. This wide divergence in the issues brings it within the principle of

Southern Pacific Co. v. *Bogert,* 250 U. S. 483,

wherein this Court says:

"Because of such wide divergence the earlier decrees do not operate as *res judicata.* And there is no basis for the claim of estoppel by election; nor any reason why the minority, who failed in the attempt to recover on one theory, because unsupported by the facts, should not be permitted to recover on another for which the facts afford ample basis." Citing cases.

Appellees rely upon the case of *Detroit and Mackinac Ry. Co.* v. *Michigan R. R. Comm.,* 235 U. S. 402. The case bears no similarity to the present. In that case the election existed on the part of the railroad company to bring an individual review proceeding in the State court, attacking a rate as confiscatory, or to bring a suit in the Federal court, for injunction upon the same ground. It presented such issue in the State court in its judicial review, wherein it was the sole petitioner. The issue of confiscation was properly presented, considered and determined against the contention of the complaining party. Thereafter an injunction was afterward brought in the Federal court, seeking to relitigate the identical point.

The plaintiff in the case at bar has brought no previous suit complaining of the effect of the rate order as confiscatory. Nor was the review proceeding of such nature nor under the statute could it be. The only issue in that case

was aggregate experience of all companies in the State and not the confiscatory effect upon the plaintiff.

To establish a claim of *res adjudicata*, it is necessary to show a precise identity of issues, namely,

> "That the precise question was raised and determined in the former suit."
>
> *Russell* v. *Place*, 94 U. S. 606.

The bill in the case last cited was for an injunction for infringement of patent. It was contended that a previous judgment had been recovered by complainant against the defendant in an action at law for infringement of the patent, and that this operated as a bar. The Court said:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the *precise question* was raised and determined in the former suit. *If there be any uncertainty* on this head in the record—as, for example: if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—*the whole subject-matter* of the action *will be at large, and open to a new contention*, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

In concluding the opinion, the Court says:

> "According to Coke, an estoppel must 'be certain to every intent,' and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence." (Italics are ours.)

See also *De Sollar* v. *Hanscome*, 158 U. S. 216.

The claim of confiscation might well have been presented in the review proceeding and rejected by the Court considering that case because not pertinent to the inquiry there. The assertion of the claim of confiscation in the State court, had it been made, would have been no defense in such statutory proceeding if the rate order was justified by aggregate experience.

In the case of *Bierce* v. *Hutchins,* 205 U. S. 340, (opinion by Mr. Justice Holmes), suit was for replevin of certain property, and it was contended that the plaintiff could not assert title to the property because theretofore he had filed a claim of lien upon this property in the receivership action under which this property was held, and had brought a suit to enforce the lien. The Court holds that it is true that a person cannot be both the owner of property and also have a lien on it. But does it follow that when he filed his lien suit, he thereby made an election, which would defeat a later action for replevin if he were unsuccessful in his lien suit? On this point the Court says:

> "It is quite true, as we have said, that the assertion of a lien is inconsistent with the assertion of a title. (*Van Winkle* v. *Crowell,* 146 U. S. 42), and therefore, *if a lien had been established* by judgment or decree, the title would be gone by force of an adjudication inconsistent with its continuance. But the *assertion* of a lien by one who has title, so long as it is only an assertion, and nothing more, is merely a mistake. It does not purport to be a choice, and it cannot be one, because the party has no right to choose. The claim in the lien suit, as was said in a recent case, was not an election, but an hypothesis."

The Court sums up the whole matter as follows:

> "The fact that a party, through mistake, attempts to exercise a right to which he is not entitled, does not prevent his afterward exercising one which he had and still has, unless barred by the previous attempt."

The fact that the plaintiff, together with others, made a futile attack on the rate order upon the aggregate basis and

was unsuccessful, does not preclude an action upon an appropriate theory.

Troxell v. *Delaware L. & W. Railroad Co.*, 227 U. S. 434,

was an action by an administratrix of a deceased employee of a railroad to recover under the Federal Employers Liability Act:

> "The widow, now administratrix, had previously brought an action, as surviving widow of the deceased, against the railroad company for the same negligence and recovered judgment, which was reversed; whereupon she brought the action which the Court considers in the case cited."

The first action was brought for wrongful death, pursuant to terms of the state statute, authorizing such proceeding. In such an action, no recovery could be had if the death were caused by the negligence of a fellow servant. The second action which was brought for the same death of the same party, for the same beneficiaries, was in such form that recovery might be had for negligence of a fellow servant, because of the provision of the Federal Employers Liability Act, so permitting. The Court says that:

> "Assuming the correctness of the view that no recovery could be had in the first action, in which violation of the Federal Employers Liability Act was not alleged 'the fact that the plaintiff *attempted to* recover under that law and *pursued the supposed remedy* until the court adjudged that it never had existed, *would not* of itself, *preclude* the subsequent pursuit of a remedy for relief to which, in law, she is entitled.' " (Citing cases).

The Court further says that the first case—

> "Was based upon a *different theory* of the right to recover than prevails under the Federal statute. Under the Pennsylvania law there can be no recovery for the negligence of the fellow servants of the deceased. This was the issue upon which the case was submitted at the second trial and a recovery had. Whether the plaintiff could recover under the Pennsylvania statute was

> not involved in the second action and the plaintiff's right to recover because of the injury by the negligence of the fellow servants, was not involved in or concluded by the first suit." (Italics are ours.)

The Court holds that the plaintiff in the first action having been the widow, and in the second suit being the administratrix, there was *not a precise identity of parties*, and rejects the argument that they are "for practical purposes," the same. It is held that the defense of *res judicata* does not operate to bar the action.

In the case of *Newburyport Water Company* v. *City*, 85 Fed. Rep. 723 (Circuit Court for the District of Massachusetts), the matter arose upon demurrer to the bill of complaint, the bill alleging that a certain act of Massachusetts "as construed by the State court is in violation of the Fourteenth Amendment of the Constitution of the United States."

The statute there for consideration was one which provided that if a city desires to acquire a water works plant owned by private companies and the parties cannot agree upon its value, that the Supreme Judicial Court shall appoint three commissioners to determine its value and in determining its value "such value shall be estimated without enhancement on account of future earning capacity or good will or on account of the franchise of said company." (Page 724.)

The water company made a deed to the city of its water plant and the city took possession of it, and being unable to agree upon the value of the plant, commissioners were appointed, the commissioners being appointed upon petition of the water company, which "petitioned the court for appointment of commissioners under the act of 1894." The water company therefore invoked the tribunal to fix prices of its property. The commissioners fixed a price and judicial hearing was had in the State court as to propriety of the price so fixed and upon this review before the court the

State court confirmed the finding of the commissioners. By their finding they excluded the value of future earning capacity, good will and franchises.

A bill in equity was later filed to have such statute declared unconstitutional, the deed cancelled and the property restored to complainant, or if the property be left with the defendant, that just compensation upon a proper basis be paid to the plaintiff. It is in such suit that the opinion is presented. The Court says:

> "It is contended that on the face of the bill, this is an attempt to review and retry here a case between the same parties already tried and determined in the state court.
>
> "The answer to this is that the *constitutional questions* stated in this bill *were not raised in the state court* and could not have been drawn in question in that suit. *Moore* v. *Sanford,* 151 Mass. 285, 24 N. E. 323; *Pitkin* v. *City of Springfield,* 112 Mass. 509.
>
> "In *Moore* v. *Sanford,* the plaintiffs, in 1885, filed a petition under the statute for damages sustained by the taking of their lands and in 1889 brought a bill in equity to test the constitutionality of the state and to set aside the taking as unconstitutional. In holding that the plaintiff had a right, by an independent proceeding, to dispute the validity of the taking and the constitutionality of the act, the Court said:
>
> > 'The plaintiffs were entitled to have the question of the constitutionality of the statute determined and under their petition for damages they were by necessary inference compelled in that proceeding to admit that it was constitutional.' If the question of the constitutionality of the act of 1894 was not open to the complainant in the proceeding in the state court, the objection that the complainant should have raised the question in that suit, falls to the ground and constitutes no defense to the present bill."

Demurrer to the bill is overruled.

It may be asserted that as the aggregate experience of all companies was involved in the review proceeding in Mis-

souri, that this necessarily involved a consideration of the experience of the plaintiff, as a part of such aggregate experience, The fact that it was so collaterally under consideration is creative of no estoppel.

The issue in the review case was as to aggregate experience. The experience of plaintiff was only incidental as it was a part of such aggregate.

In the case of *Fordham* v. *Hicks,* 240 Fed. Rep. 751, the Court had for consideration a bill for specific performance of a parol contract for the sale of land. It was asserted that the plaintiff was estopped by reason of a prior judgment between the same parties in an action for rent. The Court holding to the contrary says:

> "As judgment therefore of a court of law or a decree in chancery, is an estoppel to the parties thereto and to those who are in privity with them. This is the rule. It is however carefully and strongly fenced. The judgment must *relate to the same question and must clearly decide it.* If it came collaterally under consideration or was only *incidentally considered, there is no estoppel.*"

Held that there was no adjudication.

In the case of *National Surety Co.* v. *Jenkins,* 18 Fed. (2nd) 707, (Circuit of Appeals for the 8th Circuit, opinion by Judge Philips; Judges Booth and Sanborn concurring), the Court had for consideration an action by the National Surety Company against a receiver to compel allowance of a claim for indemnity entered into between the bank and the National Company. Certain other parties were impleaded in the action, among others, the American Surety Company and the Receiver. The American Surety Company and the Receiver. The American Surety Company set up the decree in *National Surety Company* v. *Salt Lake County,* 5 Fed. (2nd) 34, and alleged that it was an adjudication.

In the former suit claimed to constitute the adjudication the National Company was a defendant and filed its answer

setting up the claim of subrogation "and also set up the indemnity agreement and the fact that it had duly presented its claim thereon to the Receiver. The National Company prayed that it be decreed to be entitled to subrogation * * * to its pro-rata share of all dividends thereafter to be declared."

The Courts says the sole issue in fact tried in the former case, was the question of priority of subrogation as between the American Company and the National Company. The Court says:

> "The cause of action asserted by the National Company in the former suit was predicated upon its alleged right of subrogation. The cause of action sought to be enforced by the National Company in this case, is predicated upon its contract of indemnity."

The Court further says (p. 710):

> "Since the National Company seeks relief in the instant case upon a different and distinct cause of action from the one asserted by it in the former suit, the judgment in the former suit is conclusive only as to such points or questions as were actually in issue and adjudicated therein."

The Court further says (p. 710):

> "It is true that the National Company in its answer in the former suit alleged the contract of indemnity prayed that its claim thereon against the Receiver be allowed and approved. But such claim was *not a proper subject for litigation in the former suit.* It was the subject of an independent suit by the National Company against the Receiver. The American Company so contended in its brief on appeal in the former suit. Since it is a matter which could not properly have been litigated and was not actually litigated and was not necessarily determined by the decree in the former suit, it is not concluded by that decree, although it was put in issue by the pleadings. (Citing cases.) And the fact that the National Company set up the indemnity agreement and upon that agreement mistakenly sought the enforcement of a right which did not exist, it is not pre-

cluded from seeking in this action through a different remedy and upon another theory, the enforcement of a right to which it is legally entitled." (Citing cases.)

The Court, speaking of the former case, says:

"At most, the former case was merely illusory and suppositious and hence it cannot be considered as identical in any just sense of the term with the true cause of action correctly set up and supported by a right theory of the facts. Black on Judgments 733."

The difference between the present case and that before the Courts in the review proceeding is pointed out quite specifically by this Court in its opinion in dismissing the certiorari in the case of *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, which was certiorari from the review proceeding here asserted to be an adjudication. There Court there, after setting out Section 6283 of Missouri statutes, says:

"Section 6283 requires consideration *en masse* of 'the result of the earnings' of all the companies, and, upon finding an excessive 'aggregate profit,' it becomes the duty of the Superintendent to limit the 'aggregate collections' to not more than a reasonable profit. The reduced rates are applicable to the business of *all* companies alike and *without regard to* the amount of the past or prospective *profits or losses of any of them.* And the attack is by *joint action* of all the companies. It is not claimed by or on behalf of *any company* that, when applied to *its business,* the reduced rates are or would be too low to permit *the company* to make a reasonable profit or to have just compensation for *its* contracts of insurance. * * * Rates sufficient to yield adequate returns to some, may be confiscatory when applied to the business of others. But the latter have no constitutional right to prevent their enforcement against the former. The Fourteenth Amendment does not protect against competition. Moreover, 'aggregate collections' sufficient to yield a reasonable profit for *all* do not necessarily give to *each* just compensation for the contracts of insurance written by it. It has never been and cannot reasonably be held that state-made rates violate the Fourteenth Amendment *merely because the aggregate col-*

lections are not sufficient to yield a reasonable profit or just compensation to *all* companies that happen to be engaged in the affected business." (Italics are ours.)

The opinion further says that:

"The complaint was framed to secure judicial review (§ 6284) of the determination of the respondent. The ground of attack was that the *aggregate* profits were not excessive and that the *aggregate* collections permitted under the reduced rates were too low. * * * The Court was *not called upon to determine whether* the order would operate to *deprive any company of its property* without due process of law. It treated the suit as one to obtain the review provided for by § 6284." (Italics are ours.)

It is not every review which is the legal equivalent of an injunction proceeding in the Federal Court, even when such a review has the qualities of a judicial review. If its nature is such that the issue of individual confiscation is not involved, then that issue is still open for consideration by the Federal Courts. A case making this distinction is the case of *Ohio Valley Company* v. *Ben Avon Borough*, 253 U. S. 287, where the Court held that the state review proceeding was in its general nature judicial, but commenting upon it says:

"This is not disputed, but their jurisdiction as ruled by the Supreme Court (of Pennsylvania) *stops short* of what must be plainly entrusted to some court in order that there may be due process of law. Plaintiff in error has *not* had proper *opportunity for an adequate* judicial *hearing as to confiscation*, and unless such an opportunity is now available and can be definitely indicated by the court below in the exercise of its power finally to construe the law of the state (including of course Section 31) the challenged order is invalid." (Italics are ours.)

The statutory review proceedings asserted to be a bar in this case presented no opportunity whatever for hearing the question of confiscation, and can form no bar to a proceeding in which such issue is properly presented.

In the case of *Van Wert Gaslight Co.* v. *Public Utilities Commission of Ohio,* 299 Fed. Rep. 670, a statutory Court of three judges had before it an injunction to restrain a gas rate as confiscatory. The question as to the confiscatory or non-confiscatory nature of the rate had its basis in disagreement as to the proper basis to be employed in putting a value upon the properties upon which a return was to be allowed. The commission rejected the basis presented by the gaslight company and adopted, on the contrary, "an inflexible basis for calculation of valuatiion." Review proceedings were prosecuted to the Supreme Court of Ohio from the order of the commission. The Supreme Court of Ohio affirmed the valuation by the Utilities Commission. It was asserted that the prosecution of this review proceeding foreclosed a bill of equity in the Federal Court for an injunction. The Federal Court held that the basis adopted by the commission was arbitrary and violative of the Fourteenth Amendment, or at least appeared so to be upon its face. It was also held that the review in the Ohio Supreme Court was a judicial review. The Supreme Court of Ohio in the review proceeding held (as its holding is characterized by the Federal court) that "in such proceedings the plaintiff is not entitled to a full judicial inquiry into the facts and the independent judgment of the Court upon the facts as well as the law."

The bar to a full judicial inquiry into the facts as to confiscation in the case at bar was created by the terms of the statute itself. The Supreme Court of Ohio according to the statement in the case cited held that it would not, upon a review, pass upon the confiscatory nature of the Commission's action. So the Missouri Supreme Court was bound to hold here, that the proceeding before it was one for consideration of aggregate experience in which the experience of an individual company could not be considered. In the case cited the Court says that the effect of the holding of the State court was:

"A direct denial to the plaintiff utility of *that kind* of an inquiry to which it was held to be entitled in *Bluefield Co.* v. *Public Service Commission*, 262 U. S. 679, following *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, and cases there cited,"

and holds that the decision of the Supreme Court of Ohio "interpreted the State statute as withholding from the courts (of Ohio) the power to determine the question of confiscation." Such power being expressly withheld by the terms of the Missouri statute, the State court, in the review proceeding *could not* adjudge the question which the Court here has to determine.

The case falls within the language of the *Van Wert case*, wherein the Court says, that although there had been a review, judicial in its general character, it "was not *such judicial review* as constituted due process of law." In the case cited, that Court said that to hold that such review proceeding in which the issue of confiscation could not be tried out was a bar to a subsequent suit resting upon the claim of confiscation, is repugnant to the Court's sense of justice, and that the complainant was entitled to the relief of injunction, and says:

"To hold otherwise would be to deprive the complainant of its day in court upon the question of confiscation."

The question is not whether there has been *some kind of* a review but whether there has been an *adequate* judicial review of the particular question presented, which here is, unconstitutionality of the statute and rate order, and confiscation. In such a situation the inquiry is: What was the issue which has been previously tried? The Court in the *Van Wert case* says:

"That question depends, not upon the character of the body, but upon the character of the proceedings.

"The complainant in this case has never had a *full judicial inquiry* into the question of valuation, and cannot now be estopped from claiming the benefit of the true valuation of its properties in the decision *of the issue of confiscation.*" (P. 676.)

CONCLUSION.

To sum the matter, appellant has a clear right to relief—appellee in effect concedes the right but sets up two matters of affirmative defense against the application (*a*) that this is a moot case and (*b*) that the matter is *res adjudicata*. Neither of such contentions has any support whatever in anything in the record. Neither has any substance in law. The court below should be directed to grant an interlocutory injunction according to the application of plaintiff.

Respectfully submitted,

ROBERT J. FOLONIE,
WILLIAM S. HOGSETT,
JOHN S. LEAKY,
ASHLEY COCKRILL,
Counsel for Appellant.